Loh Eng Leong & Anor v Lo Mun Sen & Sons Sdn Bhd & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO A-02-661 OF 1998

HASHIM YUSOF, BAHARUDIN SHAH AND AUGUSTINE PAUL JJCA

11 AUGUST 2003

Civil Procedure *— Contempt of court — Order of committal, application for — Application for leave to commence committal proceedings — Time period not specified within which act must be done — Whether application had any merits — Whether penal notice may be endorsed — Rules of the High Court 1980 O 42, O 45*

The appellants filed an application for leave to commence committal proceedings against the respondents for breaching an order of court directing that the Register of Members of Lo Mun Sen & Sons Sdn Bhd be rectified pursuant to s 162 of the Companies Act 1965. It must be noted that it was not specified in such order the time within which the Register of Members must be rectified. The appellants however realized that they were hampered by the absence of a penal notice in the order of court. An ex parte notice of motion was then filed by the appellant asking for leave to indorse the penal notice in the order of court. The respondents, who were present, applied for an adjournment on the ground that the application ought to have been inter partes and that they should be heard before any order is made. The court agreed that the application ought to have been made inter partes as it was not one that involved the correction of a mere clerical mistake. However before considering the request for adjournment, the court felt that a more important issue was whether the application by the appellants had any merits.

Held, dismissing the application:

(1) Order 42 r 6 of the RHC refers to the instances where an order of court can be indorsed with a penal notice pursuant to which an order of committal can be made. The requirements of r 6(1) must be strictly complied with before a judgment or order can be entered on the ground of the failure of a party to do an act within a specified time. In other words, the judgment or order which requires a person to do an act must itself specify the time after its service or some other time within which the act is to be done. Therefore, an order in the form that 'unless' a party should do an act within a specified time without specifying the time after service or some other time within which the act is to be done is bad and judgment entered pursuant there is liable to be set aside (see p 287G-H, 288A–C).

(2) This was supported by O 45 r 7 of the RHC which dealt with conditions to be satisfied before an order could be enforced as provided for in r 5(see p 289D–E).

(3) It follows that where no time period has been specified in cases where it should have been done, a penal notice cannot be indorsed on it. Such an order was irregular and unenforceable. The party against whom the order was made was entitled as of right to have it set aside (see p 291A–B).

[Bahasa Malaysia summary

Perayu-perayu telah memfailkan satu permohonan untuk memohon kebenaran memulakan prosiding komital terhadap responden-responden kerana telah melanggar satu perintah mahkamah yang mengarahkan Pendaftar Keahlian Lo Mun Sen & Sons Sdn Bhd dibetulkan menurut s 162 Akta Syarikat 1965. Ia harus ditekankan bahawa tidak dinyatakan dengan spesifik dalam perintah tersebut tempoh di mana Pendaftar Keahlian tersebut perlu dibetulkan. Perayu-perayu bagaimanapun menyedari bahawa mereka terhalang disebabkan ketiadaan satu notis penting dalam perintah mahkamah tersebut. Satu notis usul ex parte telah kemudiannya difailkan untuk mengindorskan notis penting dalam perintah mahkamah tersebut. Responden-responden, yang hadir, telah memohon satu penangguhan atas alasan bahawa permohonan tersebut sepatutnya secara inter partes dan agar mereka didengar sebelum apa-apa perintah dibuat. Mahkamah bersetuju permohonan tersebut dibuat secara inter partes kerana ia bukan suatu yang memerlukan pembetulan satu kesilapan perkeranian. Bagaimanapun sebelum mempertimbangkan permohonan untuk satu penangguhan, mahkamah berpendapat satu persoalan yang lebih penting adalah sama ada permohonan oleh perayu-perayu mempunyai apa-apa merit.

Diputuskan, menolak permohonan tersebut:

(1) Aturan 42 k 6 KMT merujuk kepada keadaan-keadaan di mana satu perintah mahkamah boleh diindorskan dengan satu notis penting berikutan itu satu perintah komital boleh dibuat. Keperluan k 6(1) hendaklah dipatuhi sebelum satu perintah penghakiman boleh dimasukkan atas alasan kegagalan satu pihak untuk melakukan satu tindakan dalam tempoh yang ditetapkan. Dalam ertikata lain, penghakiman atau perintah yang menghendaki seseorang melakukan suatu tindakan dengan sendirinya perlu menetapkan masa selepas penyampaiannya atau suatu masa lain dalam tempoh di mana tindakan tersebut perlu dilaksanakan. Oleh itu satu perintah dalam bentuk di mana 'unless' satu pihak sepatutnya melakukan satu tindakan dalam masa yang ditetapkan tanpa menyatakan dengan spesifik masa selepas penyampaian atau suatu masa lain dalam tempoh tindakan tersebut perlu dilaksanakan adalah tidak sah dan penghakiman yang dimasukkan kelak boleh diketepikan (lihat ms 287G-H, 288A-C).

(2) Ini disokong oleh A 45 k 7 KMT yang membincangkan tentang syarat-syarat yang perlu dipenuhi sebelum suatu perintah boleh dikuatkuasakan sepertimana yang diperuntukkan dalam k 5 (lihat ms 291A–B).

(3) Oleh demikian di mana tiada tempoh masa telah ditetapkan dalam kes-kes di mana ia sepatutnya dilakukan, satu notis penting tidak boleh diindorskan atasnya. Suatu perintah sedemikian adalah di luar aturan dan tidak boleh dikuatkuasakan. Pihak di mana perintah tersebtu dibuat terhadapnya mempunyai hak untuk mengenepikannya (lihat ms 291A–B).]

Notes

For cases on order committals, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1498–1512.

Cases referred to

Allport Alfred James v Wong Soon Lan [1989] 1 MLJ 338 (refd)
General (Rtd) Tan Sri Hashim Mohd Ali & Anor v Francis a/l MG Mirandah [2000] MLJU 436 (refd)
Grenek Sdn Bhd v Lew Wa Chow [1991] 1 MLJ 125 (refd)
Gribbles Pathology (M) Sdn Bhd v Adventist Hospital & Clinic Services (M) Bhd [2002] MLJU 619; [2003] 1 CLJ 321 (refd)
Hitachi Sales (UK) Ltd v Mitsui OSK Lines Ltd [1986] 2 Lloyds Rep 574 (refd)
Leow Seng Huat v Low Mui Yein [1996] 5 MLJ 381 (refd)
Nicholls v Nicholls (1977) 147 NLJ 61 *Van Houten v Foodsafe Ltd* (1980) 124 SJ 277 (refd)
Patricia Liew Yam Ngoon v MME Fashion Sdn Bhd [1996] 5 MLJ 127 (refd)

Legislation referred to

Companies Act 1965 s 162
Rules of the High Court 1980 O 42 r 6(1), (2), O 45 rr 5(1), 7(2), (4)

Appeal from: Civil Suit Originating Summons No 24–51 of 1998 (High Court, Taiping)

Cecil Abraham (*Yee Mei Kean* with him) (*Shearn Delamore & Co*) for the appellant.
Yong Nyet Kim (*Kim & Assoc*) for the respondent.

Augustine Paul JCA (delivering judgment of the court): On 26 July 2001, the appellants obtained an order of court against the respondents for a direction that the Register of Members of Lo Mu Sen & Sons Sdn Berhad ('the Register of Members') be rectified pursuant to s 162 of the Companies Act 1965 by striking out the name of Loh Eng Wah therefrom as the holder of 161 shares of the said company numbered under share certificates 0050 to 0053 both inclusive. It must be observed that it did not specify the time within which the Register of Members must be rectified. The order of court was duly extracted and served on the respondents' solicitors on 15 October

2001. The respondents did not inform the appellants whether they have rectified the Register of Members as ordered. The appellants then realised that the order of court had been breached as the shares in question had been transferred to the second respondent on or about September 2002. This prompted the appellants to consider filing an application for leave to commence committal proceedings against the persons responsible for breaching the order of court. However, they realised that they were hampered by the absence of a penal notice in the order of court. Accordingly, they wrote to the deputy registrar of the court asking for the penal notice to be indorsed in the order of court. They were advised to apply formally to the court to have the indorsement. An ex parte notice of motion was then filed by the appellants asking for leave to indorse the penal notice in the order of court.

When the application came up for hearing before us on 7 August 2003, learned counsel for the appellants said that the deputy registrar ought to have indorsed the penal notice in the order of court. At this stage, learned counsel for the respondents, who was present, applied for an adjournment on the ground that the application ought to have been inter partes and that they should be heard before any order is made. Learned counsel for the appellants said that the application should properly be ex parte and that the order prayed for should be granted. With regard to the first observation made by learned counsel for the appellants, we were of the considered view that the deputy registrar acted properly in advising the appellants to obtain an order of court to enable him to indorse it with the penal notice as the draft stage of the order had passed. We agreed with learned counsel for the respondents that the application ought to have been inter partes. This is because the application is not one that involves the correction of a mere clerical mistake and the respondents must therefore be heard. Be that as it may, we felt that it may be appropriate to first determine whether the application had any merits before considering the request for adjournment.

It is true, as contended by learned counsel for the appellants, that a failure to indorse the order of court with a penal notice is fatal to an application for committal (see *Leow Seng Huat v Low Mui Yein* [1996] 5 MLJ 381; *General (Rtd) Tan Sri Hashim Mohd Ali & Anor v Francis a/l MG Mirandah* [2000] MLJU 436; *Gribbles Pathology (M) Sdn Bhd v Adventist Hospital & Clinic Services (M) Bhd* [2002] MLJU 619; [2003] 1 CLJ 321). The Rules of the High Court 1980 ('the RHC') provide for the instances where an order of court can be indorsed with a penal notice pursuant to which an order of committal can be made. Reference is first made to O 42 r 6 of the RHC ('r 6') which reads as follows:

> (1) Subject to paragraph (2), a judgment or order which requires a person to do an act must specify the time after service of the judgment or order, or some other time within which the act is to be done.
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> (2) Where the act which any person is required by any judgment or order to do is to pay money to some other person, give possession of any immovable property or deliver any movable property, a

time within which the act is to be done need not be specified in the judgment or order by virtue of paragraph (1), but the foregoing provision shall not affect the power of the Court to specify such a time and to adjudge or order accordingly.

The requirements of r 6(1) must be strictly complied with before a judgment or order can be entered on the ground of the failure of a party to do an act within a specified time. In other words, the judgment or order which requires a person to do an act must itself specify the time after its service or some other time within which the act is to be done. Therefore, an order in the form that 'unless' a party should do an act within a specified time without specifying the time after service or some other time within which the act is to be done is bad and judgment entered pursuant thereto is liable to be set aside (see *Van Houten v Foodsafe Ltd* (1980) 124 SJ 277).

Order 45 r 5 of the RHC ('r 5') provides for the enforcement of an order of court by, inter alia, an order of committal. It reads as follows:

(1) Where —

(a) a person required by a judgment or order to do an act within a time specified in the judgment or order refuses or neglects to do it within that time or, as the case may be, within that time as extended or abridged under Order 3 rule 5; or

(b) a person disobeys a judgment or order requiring him to abstain from doing an act,

then, subject to the provisions of these rules, the judgment or order may be enforced by one or more of the following means, that is to say —

(i) with the leave of the Court, an order of committal;

(ii) where that person is a body corporate, with the leave of the Court, an order of committal against any director or other officer of the body;

(iii) subject to the provisions of the Debtors Act 1957, an order of committal against that person or, where that person is a body corporate, against any such officer.

(2) Where a judgment or order requires a person to do an act within a time therein specified and an order is subsequently made under rule 6 requiring the act to be done within some other time, references in paragraph (1) of this rule to a judgment or order shall be construed as references to the order made under rule 6.

(3) Where under any judgment or order requiring the delivery of any movable property the person liable to execution has the alternative of paying the assessed value of the property, the judgment or order shall not be enforceable by order of committal under paragraph (1), but the Court may, on the application of the person entitled to enforce the judgment or order, make an order requiring the first mentioned person to deliver the property to the applicant within a time specified in the order, and that order may be so enforced.

A It will be observed that r 5(1) provides that an order may be enforced by, inter alia, committal where it requires the doing of an act within a specified time. In commenting on r 5, Mohamed Dzaiddin J (as he then was) said in *Grenek Sdn Bhd v Lew Wa Chow* [1991] 1 MLJ 125 at p 126:

> The effect of the above rule is clearly explained in *The Supreme Court Practice 1985* at para 45/5/1 at p 666 which states:
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> 'This rule governs the methods for the enforcement by the Court of its judgments or orders in circumstances amounting to a contempt of Court. It applies to both positive and negative judgments or orders, those which require a party to do an act as well as those which require a party to abstain from doing an act, subject, however to this important qualification, that the coercive methods of enforcement under this rule cannot be employed to enforce a judgment or order to do an act unless that act is required to be done, but is not done, within a specified time which has been fixed either by the original judgment or order, or by a subsequent order extending or abridging such time under O 5 r 5, or fixing such time under r 6.'

Order 45 r 7 of the RHC ('r 7') deals with the conditions to be satisfied before an order can be enforced as provided by r 5. It reads as follows:

(1) In this rule references to an order shall be construed as including references to a judgment.

(2) Subject to Order 24 rule 16(3), Order 26 rule 7(3), and paragraphs (6) and (7) of this rule, an order shall not be enforced under rule 5 unless —

(a) a copy of the order has been served personally on the person required to do or abstain from doing the act in question; and

(b) in the case of an order requiring a person to do an act, the copy has been so served before the expiration of the time within which he was required to do the act.

(3) Subject as aforesaid, an order requiring a body corporate to do or abstain from doing an act shall not be enforced as mentioned in rule 5(1)(ii) or (iii) unless —

(a) a copy of the order has also been served personally on the officer against whose property leave is sought to issue a writ of seizure and sale or against whom an order of committal is sought; and

(b) in the case of an order requiring the body corporate to do an act, the copy has been so served before the expiration of the time within which the body was required to do the act.

(4) There must be indorsed on the copy of an order served under this rule a notice in Form 87 informing the person on whom the copy is served —

(a) in the case of service under paragraph (2), if he neglects to obey the order within the time specified therein, or, if the order is to abstain from doing an act, that if he disobeys the order, he is liable to process of execution to compel him to obey it; and

(b) in the case of service under paragraph (3), that if the body corporate neglects to obey the order within the time so specified or, if the order is to abstain from doing an act, that if the body corporate disobeys the order, he is liable to process of execution to compel the body to obey it.

(5) With the copy of an order required to be served under this rule, being an order requiring a person to do an act, there must also be served a copy of any order made under Order 3 rule 5, extending or abridging the time for doing the act and, where the first mentioned order was made under rule 5(3) or 6 of this Order, a copy of the previous order requiring the act to be done.

(6) An order requiring a person to abstain from doing an act may be enforced under rule 5 notwithstanding that service of a copy of the order has not been effected in accordance with this rule if the Court is satisfied that, pending such service, the person against whom or against whose property it is sought to enforce the order has had notice thereof either —

(a) by being present when the order was made; or

(b) by being notified of the terms of the order, whether by telephone, telegram or otherwise.

(7) Without prejudice to its powers under Order 62 rule 5, the Court may dispense with service of a copy of an order under this rule if it thinks it just to do so.

Rule 7(4) provides that it is only where the order of court is one that must specify the time period within which an act must be done that can be indorsed with the penal notice. Rule 7(2)(b) provides that an order shall not be enforced under r 5 unless a copy of the order requiring a person to do an act has been served on him before the expiration of the time within which he was required to do the act. Rule 7(4) deals with the indorsement of the penal notice in the case of service under r 7(2) informing the person on whom the order is served that if he neglects to obey the order within the time specified therein then he is liable to process of execution to compel him to obey it.

It is therefore clear that where an order of court to do an act must specify the time within which an act is to be done then such time must be specified. It is only in such cases that there can be indorsement with the penal notice. As the indorsement with the penal notice is a prerequisite to the making of a committal order which involves the liberty of the subject it is particularly important that the relevant rules are duly complied with (see *Nicholls v Nicholls* (1977) 147 NLJ 61; *Allport Alfred James v Wong Soon Lan*

A [1989] 1 MLJ 338). It follows that where no time period has been specified in cases where it should have been done a penal notice cannot be indorsed on it. Such an order is irregular and unenforceable (see *Grenek Sdn Bhd v Lew Wa Chow* [1991] 1 MLJ 125; *Patricia Liew Yam Ngoon v MME Fashion Sdn Bhd* [1996] 5 MLJ 127). The party against whom the order is made is entitled as of right to have it set aside (see *Hitachi Sales (UK) Ltd v Mitsui* B *OSK Lines Ltd* [1986] 2 Lloyds Rep 574). However, the absence of a time period to do an act which falls under r 6(1) is not necessarily fatal. It can be cured by a supplemental order (see *Grenek Sdn Bhd v Lew Wa Chow*). In this regard, *The Supreme Court Practice 1985* says at p 632:

> C When the order omits to fix a time, it is not thereby rendered ineffectual, but the court will make a supplemental order fixing the time, in the ChD designated a 'four-day order,' although the time after service of the order is not always four days (*Needham v Needham* (1842) 1 Hare 633). But, except in the case of a judgment or order for the payment of money to some other person, or for giving possession of land or for delivery of goods, until a time is D fixed the order cannot be enforced (*Gilbert v Endean* (1878) 9 Ch D 259, p 266, CA; *Re Wilde* (1910) WN 128, CA; *Townend v Townend* (1906) 93 LT 680, CA (a divorce case).

In this case, the order of court dated 26 July 2002 which requires the Register of Members to be rectified is not one that falls within O 42 r 6(2). As it is one that must be done within a prescribed period the time period E must have been specified in it before it can be enforced. There is no compliance with this requirement as the time period within which the act must be done has not been specified. Neither was there a supplemental order to fix a time period. The corollary is that the appellants are not entitled to have the penal notice indorsed in the order. The application before us is therefore without merit. Accordingly, we dismissed it without F the need to consider an adjournment as requested by the respondents.

Application dismissed.

Reported by Mariette Peters Goh

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